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OFFERS CALLING FOR A CONSIDERATION OTHER THAN A COUNTER PROMISE.

WHERE an offer contemplates a unilateral contract, situations may easily arise which, pressed to a logical conclusion, must result in admitted hardship. If there is no flaw in the logic, and no sound theory can be found which will admit of an exception to the apparently necessary result, we must admit that the law is defective in such a case. If that is the situation, legislation is called for, and if no remedial law is passed, the natural conclusion is, either that the cases are so infrequent as not to arouse public sentiment, or that the sense of justice of the community is not sufficiently aroused to insist upon legislative reform.

Legislation which aims to bring about a radical change in the substantive law has great possibilities of danger, as any well informed and thoughtful lawyer knows. If the profession can meet any specific difficulty by gradual change and without legislative aid, the self evolving spirit of our law is preserved, and better results obtained. The difficulty is that the safe, but sometimes extreme, conservatism of the well trained lawyer often impels him to oppose any argument or suggestion tending to broaden or modernize the existing rules of law.

No rule is more firmly embodied in our system of law than that involving the technical doctrine of consideration in contract. Yet the doctrine is crude and little adapted, in many respects, to our modern complex life. It should be modified and changed. In fact this is being done, as is shown by many judicial utterances. Fre-

quently these are illogical and poorly reasoned, indicating a failure fully to grasp the underlying principles, and yet often they manifest a sound instinct. It has been a remarked characteristic of our courts, both English and American, that many times they reach correct results by means of fallacious and inadequate reasoning. Such appears to be the situation as to the rule requiring a consideration for a simple promise. Indeed there seems to be a gradual but decided tendency towards reducing this purely technical and quite unnecessary [1] rule to the narrowest limits. This is seen not only in the decisions, but also in occasional discussions by scholarly writers who have a profound knowledge of their subject.[2]

Bearing this tendency in mind, the query arises whether there is any sound theory by which the possible harsh results of the rule in the case of proposed unilateral contracts can be eliminated. The present writer must admit in advance that he cannot suggest any theory which meets, to his own satisfaction, all cases, or which strikes him as unquestionably sound, even as to the situations to which it might apply. Perhaps, however, a review of some of the decisions, and also of hypothetical cases thrashed out in the classroom, may lead to suggestive thought on the part of some reader.

As simple contracts are based upon agreement, the offer may demand any consideration desired, in exchange for the proposed promise. Whether the offer calls for a counter promise, or some other consideration, is a question of fact in each case. If the offer calls for something other than a counter promise, it logically follows that such offer cannot become a promise until that which is required as a consideration has been furnished. Prior to this point there is no contract. It is not possible for the offeree to force a counter promise upon the offeror, because he does not desire or ask for a promise.

Suppose, for example, the following case:

A desires his safe moved from his old office to a new one. He asks B to do this act, and says he will pay him twenty-five dollars for it. When B has carried the safe to the door of the new building, A appears and tells B that he withdraws his offer, directing him to leave the safe there. Nevertheless B proceeds and places the safe in the

[1] That it is unnecessary, is shown by the fact that European systems based upon the Roman law have no such requirement.

[2] See for example the interesting articles by Dean Ames, "Two Theories of Consideration." 12 HARV. L. REV. 515.

new office. Under such circumstances how can a contract be found, or how can A be held to any liability?

Or suppose another case:

A merchant is anxious to have a cartload of goods placed upon an outgoing steamer, and there is barely time to accomplish this. He asks a cartman to take the goods to the steamer, and offers twenty-five dollars for the act. The cartman loads the goods and proceeds towards the wharf. On the road another merchant hails him and offers one hundred dollars for the immediate cartage of his own goods. The cartman thereupon places the first merchant's goods in a safe place, and proceeds to carry the second load. As the cartman has never obligated himself to take the first load, he cannot be held liable for failure to perform the work, and the first merchant suffers his loss without remedy.

In each of these cases it is assumed as a fact that the offer calls for an act. But as in the safe case the offer is revoked before the consideration is furnished, that is, before the act requested is completed, and as in the cartage case the offeree voluntarily ceases performance of the act before completion, there can be no contract in either.

At first thought it may be suggested that in the safe case the offeror, by ordering the safe mover to drop the safe, waives the completion of the work. The conclusive answer is that the law demands consideration as an element of contract, and refuses to annex this obligation to the acts of the parties unless the requisite elements exist. There is no such thing as waiving a positive requirement of the law. Until the entire consideration is furnished there is nothing but an offer, which can always be withdrawn.

Again it may be said that as soon as the safe mover begins his work, he indicates his acceptance, a contract arises, and it is too late to withdraw. True, there is an acceptance, but the suggestion overlooks the fact that want of consideration is the difficulty, not want of agreement. This suggestion would meet the case of a proposed bilateral contract, but as the offer asks for an act, neither a counter promise nor anything else except the very thing demanded can be furnished as a consideration. Until the act is completed the consideration is not given.

It does not help the situation to suggest that part of the work has been done, and there is a readiness to do the rest, because until

the entire consideration is furnished there is merely an offer, which can therefore be withdrawn. As there is an offer, and the act is being done in exchange for the proposed promise, it is not possible to allow a recovery for the work done, on the theory of a *quantum meruit*, because that would be putting an obligation upon the offeror on the theory of an implied promise. Any such idea is distinctly negatived by the existence of the offer, and no implication is possible in view of the expressed intent of the offeror as shown under such circumstances. Continuing to move the safe, after the offer is revoked, accomplishes nothing, because there is no longer an offer to ripen into a promise.

If part performance has unjustly enriched the offeror, a recovery for such enrichment may be had in an action on the theory of quasi-contract. In the supposed case of the safe mover, however, there could be no such recovery. There is no increase of the offeror's estate and the rule as to unjust enrichment cannot be invoked. Indeed, there might actually be a loss to him, if he desired the safe returned to his old office.

The well known case of Fitch *v.* Snedaker [1] goes even further. A reward was offered for information leading to the arrest and conviction of a murderer. On the trial the plaintiffs offered to prove that before the offer was known to them they gave information which led to the arrest of the murderer. This evidence was excluded. They then offered to prove that with a view to the reward, they spent time and money, and made disclosures whereby a conviction was secured. This evidence was also excluded, and the direction of a nonsuit was sustained on appeal.

Here we have an offer unrevoked, an acceptance of that offer, and actual performance of the acts requested, but in spite of all this there was no contract. Giving information leading to arrest took place before the offer was known, hence there could be no acceptance at the time this part of the work was done. The acceptance took place after the arrest, and although information leading to the conviction was given pursuant to the offer, and in exchange for the proposed promise, yet this was not enough. Information leading to arrest as well as to conviction was requisite. The plaintiffs had actually furnished all that was asked, but as the first part was performed in ignorance of the offer, it could not have been given in

[1] 38 N. Y. 248.

exchange therefor. When they knew of the offer it was too late. A part of the requested act had already been given, and hence could not be furnished afterwards as consideration. After acceptance only part of the consideration was given, and this was not enough. Such a conclusion is strictly logical, and no other seems possible, if legal principles are understood and followed.

In Biggers *v.* Owen [1] there was a similar offer of reward. The court held that until some one complied with the terms of the offer, it could be revoked.[2] In that case some work had been done pursuant to the offer, and one woman arrested but discharged.

In Los Angeles, etc., Co. *v.* Wilshire [3] the defendants gave an instrument purporting to be a promissory note payable to the order of the plaintiff, "thirty days after the completion of" the railway contemplated by the parties. This note, with several others, was given to a bank pursuant to an escrow agreement. By this agreement the notes were to be handed to the plaintiff on the completion of the road. The plaintiff spent money in obtaining the franchise and building the road. Before its completion defendants served notice on the plaintiff that they did not recognize any liability on account of said written instruments, because the road was not completed in time. The plaintiff continued the work, completed the road, and began an action. At the trial the plaintiff had judgment which was affirmed on appeal.

The court says: [4]

"The contract at the date of its making was unilateral, a mere offer that, if subsequently accepted and acted upon by the other party to it, would ripen into a binding enforceable obligation. When the respondent purchased and paid upwards of fifteen hundred dollars for a franchise, it had acted upon the contract; and it would be manifestly unjust thereafter to permit the offer that had been made to be withdrawn. The promised consideration had then been partly performed, and the contract had taken on a bilateral character, and if the appellant thereafter thought he discovered a ground for rescinding the contract, it was, as it always is, a necessary condition to the rescission that the other party should be made whole as to what he had parted with on the strength of the contract. The notice of withdrawal from the contract was ineffectual, therefore, for several reasons. In the first place, it was based on a wrong theory; the reason

[1] 79 Ga. 658.
[2] See also Cook *v.* Casler, 87 N. Y. App. Div. 8.
[3] 135 Cal. 654.
[4] *Ibid.*, 658.

given for it was that the road was not constructed within the agreed time, when, as was determined subsequently, there was no time agreed upon. Again it came too late, after the obligations of the parties had become fixed."

The case is singular. Considering it from the standpoint of the court, as expressed in the language quoted, we find an offer calling for an act, *i. e.*, a proposed unilateral contract. On this state of facts the court proceeds to tell us that after a portion of the requested act had been completed, it would be unjust to permit the offer to be withdrawn. That is to say, although the consideration had not been furnished, and hence no promise had arisen, yet, as it works injustice, the offer cannot be withdrawn. It seems that, though its notion was very vague, the court had in mind some idea of estoppel.

The opinion goes on to say that after part performance "the contract had taken on a bilateral character." This is a remarkable instance of confusion of thought. By what magic the offer had been turned into a "contract" does not appear. But then, in spite of the fact that it has said that a bilateral contract has arisen, the court seems to think that nevertheless there may be a withdrawal, provided the parties can be placed in *statu quo*. The expression "rescission," however, seems to indicate that the court considered that there was a contract. If there was a contract, what possible ground existed for rescission? If there was merely an offer, what can be intended by "restitution"? The defendants had received nothing to restore. Perhaps the court means that under such circumstances an offer cannot be withdrawn, because it believes there is then an estoppel. Again, at the end of the quotation, the court seems to have an idea that there is a contract after all, as shown by the expression "after the obligation of the parties had become fixed."

It is not very apparent what difference it could make whether the defendants assigned a correct or incorrect theory for their proceeding. The sole question is whether the defendants could withdraw their offer at any time before it ripened into a promise. It would seem that the court proposed to enforce its ideas of justice, even though it was not clear as to the theory upon which it should proceed. Nevertheless, a thought is suggested which will be further commented upon below.

The case has been discussed somewhat at length, both because it

is a good example of the lack of clear thinking which is often found in the opinions of the courts upon this subject and also because it suggests the idea of an estoppel or something analogous thereto.

It is not so clear that any such point as that raised by the court is necessarily involved. The action was upon a written instrument in form a promissory note. Can this be spoken of as an offer? What was the instrument when placed in escrow? It was not negotiable, and as there was no consideration it was not a contract. How can an offer be placed in escrow? The court says that the action was based "upon a written instrument." This writing seems to have been merely an acknowledgment of indebtedness which was delivered according to the terms of the escrow agreement. The facts hardly warrant the inference that the escrow agreement and the note were together intended as an offer. It seems probable that there was a bilateral contract made at the time of executing the escrow agreement. In that case it would be clear that the defendants could not withdraw.

It sometimes happens that a case is discussed on the assumption that a question of the revocation of an offer is involved, while in fact no such point is raised. Thus in Blumenthal *v.* Goodall [1] the plaintiff was a broker suing for his commission. He had been authorized by defendant to sell certain property, and had procured a customer who signed a memorandum, was ready to make a suitable deposit, and had received an abstract of title. Thereafter the defendant attempted to revoke his offer. Of course it was too late. The plaintiff had furnished the act requested, namely, producing a customer ready to buy, and hence the promise to pay the commission had arisen, and the defendant was then bound. The case was correctly decided and presents no difficulty.

In Plumb *v.* Campbell [2] the court touches upon the question of unilateral contract, and quotes with approval a statement by Parsons,[3] which seems to suggest that beginning to do an act is enough to cause the contract to arise. It is not at all clear that Parsons intended to lay down any such proposition, and from the entire statement it seems probable that he had bilateral contracts in mind, except in cases where the act has been performed, and hence a contract has arisen. Plumb *v.* Campbell did not directly involve the

[1] 89 Cal. 251.
[2] 129 Ill. 101.
[3] 1 Parsons, Contracts, § 450.

point, because if there was an offer asking for the delivery of bonds as a consideration, which, though very doubtful, was the construction the court seemed to put upon the transaction, then as the delivery had taken place the act was performed. There was no attempted revocation, and the question arose with reference to the construction of the statute of limitations. It does, however, involve the question we are discussing, in that the point turned upon the time at which the contract arose.

The harsh results which are possible in this class of cases are revolting to a natural sense of justice, and there is a constant effort to devise some way out of the difficulty. Under these circumstances one is called upon to make sure that there is no fault with the analysis, and that the difficulty does not lie there, rather than with the rule of law.

An analysis of a simple contract shows the essential elements to be mutual assent and consideration. When an offer is made it can be accepted immediately. If such acceptance involves also a counter promise the contract arises thereupon. If anything except a counter promise is required as a consideration, there is no contract upon acceptance only, owing to the lack of consideration. In the case of the safe mover, put in the early part of this article, if the safe mover, either by word or action accepts the offer, we have agreement. If he completes the moving there is consideration. But, it is argued, the offer can be withdrawn at any time, until it becomes a promise, and acceptance does not affect this, because an irrevocable offer is inconceivable in law, and to hold otherwise is to do away with the doctrine of consideration.

However, it is not so certain that this argument is sound. To assume that an accepted offer calling for an act as consideration is under some circumstances irrevocable does not compel us to hold that such offer is already a promise or can be enforced as such. An offer remaining open is simply a statement by the offeror that he wishes a certain thing and will continue in that state of mind. Upon such indication of intent the withdrawal of the offer after the offeree has accepted and commenced to do the act in reliance thereon, will cause loss. Does that come under the ordinary rule of *estoppel in pais?*

The doctrine of consideration is not affected in any way. There is no promise until the consideration is completely performed, and the offeror can never be held to his proposed promise unless he receives the consideration, but nevertheless he cannot withdraw his offer.

Have we too readily acquiesced in the idea that an offer must necessarily be revocable under all circumstances? It may be urged that as the offeror has changed his mind, there is never actual mutual assent or agreement. But this is frequently the case, and does not prevent a contract from arising, as for instance, in cases of ineffectual attempts to revoke an offer.

The foregoing suggestion as to a possible estoppel does not meet all situations. Thus in the hypothetical case of the truckman given above, the hardship falls upon the merchant. As the truckman makes no offer it seems impossible to prevent him from leaving the goods in a suitable place, even though he thereby disappoints the just expectations of the merchant. There can be no estoppel in such a case at any rate. Again, in the safe case, if the owner takes possession of the safe, even though he be estopped from withdrawing his offer, there can be no contract, because the safe mover is prevented from performing by being deprived of the possession of the safe, and the supposed estoppel is of no avail because the consideration is not and cannot be performed. It is entirely immaterial that this result is brought about by the offeror's own act. The doctrine of consideration prevents a contract from arising.

Or, if the safe mover refuses to surrender the safe upon demand of the owner, and completes the act of moving, he thereby commits a tort, and public policy would seem to make it impossible for a tortious act to form the consideration of a promise.

Professor Williston says of this class of cases:

"To deny the offeror the right to revoke is, therefore, in effect to hold the promise of one contracting party binding, though the other party is neither bound to perform nor has actually performed the requested consideration.

"The practical hardship of allowing revocation under such circumstances is all that can make the question doubtful."

This argument, on the other hand, does not seem conclusive against the theory of an estoppel. Such a theory does not require, even in effect, that the promise of one should be binding although he has not received his consideration.

If the offeror is not allowed to withdraw his offer, this does not necessarily result in a promise, and it never will so result until the consideration, the act, is actually performed. It merely prevents

him from withdrawing his offer, when the circumstances may render such action unjust, but he has made no promise, and hence, necessarily, cannot be called upon to perform until he has received the consideration demanded. Thus both parties are protected, and a just result is attained.

It is by no means unusual for a party to place himself in a position where he is no longer free, although his offeree may be. This is practically the situation in cases of ineffectual revocation. The offeree is not yet bound, yet the offeror has changed his mind, and desires to escape the consequences of his offer. If he is unable to communicate a revocation he may become bound by a contract in spite of his wishes and attempts to escape. It is true that we are not accustomed to speak of an offeror as bound by his offer, but nevertheless he is responsible for its possible consequences, as he is for any action in his life.

An estoppel simply prevents him from withdrawing such action when it will work injustice to permit him to do so. It merely limits the power of revocation, and why should not such power be limited in such cases? The limitation takes place only when it is required by strict justice and when both parties are fully protected. Certainly these cases do not fall strictly within the equitable doctrine of *estoppel in pais*, as that subject has heretofore been developed, but a doctrine somewhat analogous thereto and depending upon the same ideas would seem to be possible, even though there may be some more suitable nomenclature.

When there is difficulty in escaping from a troublesome position it is too frequently the habit to drag in equitable estoppel with no clear idea of the meaning of the term, but with the satisfaction of knowing that it sounds well. Admitting such a danger it would still seem that this doctrine, hinted at in some of the decisions, may, in spite of some difficulties, offer relief from occasional intolerable situations.

As has been well said [1] there are few more troublesome positions in our law.

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[1] See Williston's Wald's Pollock, 3 ed. p. 34, n. 39. The hardship involved in these cases did not trouble Professor Langdell in the least. He merely said, "The true protection for both parties is to have a binding contract made before the performance begins, by means of mutual promises." (Summary of Contract, § 4.) This is much like replying to a question as to a specific for a certain poison: "Don't take the poison."